Supreme Court, U.S.
FILED
DEC 2 2002
CLERK

No. 02-508

In The
Supreme Court of the United States

UNITED STATES OF AMERICA and STATE OF CALIFORNIA ex rel. JOHN DALE HANSEN,

Petitioners,

v.

CARGILL, INCORPORATED, LESLIE SALT CO., REAL ESTATE DYNAMICS, INC., and CRAIG D. HUNGERFORD,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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CORPORATE DISCLOSURE STATEMENT

Respondent Cargill, Incorporated ("Cargill") has no parent corporation, and no publicly held company owns 10% or more of Cargill's stock.

Respondent Real Estate Dynamics, Inc., also has no parent corporation, and no publicly held company owns 10% or more of Real Estate Dynamics, Inc.'s stock.

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STATEMENT OF THE CASE

Although his petition tries to make it appear that more is at stake, Mr. Hansen has come before this Court seeking review of an unpublished circuit court decision that applied well-established case law to dismiss Hansen's case for lack of subject matter jurisdiction. Hansen's petition takes a scattershot approach, raising five questions for review but failing to elaborate on each point in a systematic or organized manner. In all of that verbiage, Hansen fails to identify any reason, such as a split in the Circuits, why this Court should grant certiorari in this case.

Mr. Hansen's petition, and indeed this entire case, are an extension of Mr. Hansen's political campaign against the State of California's decision to purchase certain land from Cargill for purposes of environmental preservation. (Excerpts of Record filed in the Ninth Circuit ("ER") 205-42, 523-35.) In his amended complaint filed on November 10, 1998, Hansen claimed that the purchase price the State paid to Cargill was based on an allegedly inflated appraisal (the "Appraisal") that Cargill had submitted to state and federal authorities. (ER 520-21.) Respondents, Craig Hungerford and his company, Real Estate Dynamics, Inc., were named as defendants because they prepared the Appraisal. (ER 521.)

Under both the federal and California False Claims Acts, a qui tam relator such as Hansen cannot bring a False Claims Act case based on matter which was publicly disclosed in certain designated forums before the relator filed his lawsuit, unless the relator is an "original source" of the allegations. *See* 31 U.S.C. § 3730(e)(4); CAL. GOV'T CODE § 12652(d)(3). Both the District Court and the Ninth

Circuit therefore ruled correctly that Hansen failed to establish subject matter jurisdiction under these statutes.

As the District Court explained in some detail, Respondents presented overwhelming evidence that the subject matter of Hansen's complaint had been aired extensively in public media sources before Hansen filed this lawsuit. (Petition, at App.10 to App.14.) The District Court relied on the Ninth Circuit's clearly expressed rule that media reports need only be substantially similar to allegations in a qui tam complaint to bar jurisdiction over that complaint. *United States ex rel. Lujan v. Hughes Aircraft Co.*, 162 F.3d 1027, 1032 (9th Cir. 1998). Other Circuits uniformly hold that federal courts lack jurisdiction over a False Claims Act action if the action is based *in any part* on publicly disclosed allegations or transactions. *United States ex rel. Precision Co. v. Koch Indus.*, 971 F.2d 548, 553 (10th Cir. 1992); *United States ex rel. Jones v. Horizon Healthcare Corp.*, 160 F.3d 326, 332 (6th Cir. 1998); *United States ex rel. Fed. Recovery Servs. v. Crescent City E.M.S., Inc.*, 72 F.3d 447, 451 (5th Cir. 1995); *United States ex rel. Cooper v. Blue Cross & Blue Shield*, 19 F.3d 562, 567 (11th Cir. 1994); *United States ex rel. Kreindler & Kreindler v. United Techs. Corp.*, 985 F.2d 1148, 1158 (2d Cir. 1993).

The lower courts recognized that Hansen did not qualify for the exception to the public disclosure bar for someone who was an original source of the information on which the case is based. To qualify as an original source, Hansen had to show direct and independent knowledge of the information on which his complaint was based. 31 U.S.C. § 3730(e)(4)(B); CAL. GOV'T CODE § 12652(d)(3)(B); *United States v. Alcan Elec. & Eng'g, Inc.*, 197 F.3d 1014, 1020 (9th Cir. 1999). To prove direct knowledge, Hansen

had to "show that he had firsthand knowledge of the alleged fraud, and that he obtained this knowledge through his own labor unmediated by anything else." *Id.* (internal quotation marks omitted).

Applying this law, the District Court specifically found that "Hansen obtained his knowledge of the alleged fraud second hand; he was not a percipient witness to any of the alleged facts upon which his allegations are based." (Petition, at App.24.) The District Court found that Hansen had direct knowledge only of a later appraisal *he* commissioned to support his lawsuit, but that appraisal was not evidence of the supposed fraudulent claim on which his complaint is based. (Petition, at App.26 to App.28.) Hansen therefore lacked direct knowledge of the pertinent facts alleged in his complaint because, for instance, he obtained a copy of the Appraisal itself only by filing a Public Records Act request with the State of California. (Petition, at App.24.)

Based on the application of settled law, the District Court dismissed Hansen's complaint for lack of subject matter jurisdiction. (Petition, at App.1.) The Ninth Circuit affirmed in the unpublished decision which Hansen now asserts this Court should review. (Petition, at App.31.)

REASONS WHY CERTIORARI SHOULD BE DENIED

Certiorari Is Not Appropriate to Revisit Settled Law. Hansen asks this Court to overturn the settled law we summarize above in the Statement of the Case. (Petition, at 17 (Hansen wants the Supreme Court to "steer[] the district and circuit courts back on course").) None of the

criteria set forth in Rule 10, such as a circuit split, is present here.

Hansen's primary contention appears to be that the Ninth Circuit does not follow a rule Hansen himself invented, namely that "parasitism is the proper consideration for invocation of the public disclosure bar." (Petition, at 13 (emphasis omitted).) To support this point, Hansen cites approvingly to *United States ex rel. Springfield Terminal Ry. v. Quinn*, 14 F.3d 645, 649 (D.C. Cir. 1994). But *Springfield Terminal Railway* nowhere states the legal test that Hansen advances, although it does discuss avoidance of parasitic lawsuits as one policy consideration Congress has taken into account in amending the False Claims Act over the years. In any event, Hansen's argument does not posit a circuit split or other basis under Rule 10 for certiorari, because the Ninth Circuit has adopted as its own the *Springfield Terminal Railway* analysis. *United States ex rel. Found. Aiding the Elderly v. Horizon West, Inc.*, 265 F.3d 1011, 1015, *amended*, 275 F.3d 1189 (9th Cir. 2001). Thus, there is no uncertainty in the governing precedent for this Court to resolve.

Likewise, Hansen complains that the Ninth Circuit's analysis is inconsistent with its prior decision in *United States ex rel. Devlin v. State of California*, 84 F.3d 358, 362 (9th Cir. 1996). (Petition, at 8-9.) But Hansen is wrong. There, the relators learned from a county employee of alleged fraud by the county. The court held that the relators were not original sources, because they had "derived [the information] secondhand." *Id.* at 361. The Ninth Circuit noted that it had previously stated this rule in two prior decisions, *id.* at 360, and that its decision followed the law of three other circuits, *id.* at 362-63.

Hansen also contends that the Ninth Circuit's decision here contradicts *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943). However, *Marcus*'s statutory analysis is based on an outdated version of the statute, which has been substantially amended since that case was decided. The D.C. Circuit's decision in *Springfield Terminal Railway*, with which Hansen apparently agrees, explains this history in some detail. 14 F.3d at 649-51 (the statute has ebbed and flowed over the years between liberal allowance of *qui tam* cases and more restrictive provisions). Here again, Hansen fails to identify any reason why this Court needs to examine *Springfield Terminal Railway*'s analysis, which the Ninth Circuit has already adopted.

Certiorari Is Not Appropriate for Hansen's "Public Watchdog" Argument. Hansen asserts that he should be considered an original source, because he calls himself a "public watchdog." He cites no authority for this position, which is refuted by the rule that a relator may qualify for original source status only by showing "that he had firsthand knowledge of the alleged fraud, and that he obtained this knowledge through his own labor unmediated by anything else." *E.g.*, *United States v. Alcan Elec. & Eng'g, Inc.*, 197 F.3d 1014, 1020 (9th Cir. 1999) (internal quotation marks omitted).

Hansen's proposal to change the entire fabric of original source law by permitting a self-invented and entirely undefined "public watchdog" to qualify is (1) advanced entirely without reference to the statutory language of the False Claims Act or any relevant case law, (2) was summarily rejected by the District Court and the Ninth Circuit, and (3) finds no support in the law of any Circuit. Thus, there is no basis under Rule 10 for Hansen

to ask this Court to consider his "public watchdog" argument.

This Court Just Recently Declined to Opine on the Constitutionality of Unpublished Court of Appeals Opinions. Searching for a hook to gain this Court's attention, Hansen contends that the Ninth Circuit violated the United States Constitution by issuing an unpublished opinion in his case. However, this Court declined to consider this issue just two months ago. *Symbol Technologies, Inc. v. Lemelson Med., Educ. & Res. Found.*, 277 F.3d 1361, 1366-68 (Fed. Cir. 2002) (rejecting constitutional challenge to unpublished opinions), *cert. denied*, 154 L.Ed. 2d 36 (Oct. 7, 2002).

The Federal Circuit in that case adopted the Ninth Circuit's earlier decision in *Hart v. Massanari*, 266 F.3d 1155 (9th Cir. 2001), an opinion the Federal Circuit called "comprehensive" and "scholarly." (The only other circuit opinion on this topic, which reached the opposite conclusion from *Symbol Technologies* and *Hart*, has been vacated by the Eighth Circuit, sitting en banc. *Anastasoff v. United States*, 223 F.3d 898, *vacated*, 235 F.3d 1054 (8th Cir. 2000).)

Given that this Court chose just two months ago to deny certiorari in the *Symbol Technologies* case, it would make little sense for the Court to use this unpublished decision as a vehicle for considering whether unpublished opinions are constitutional.

The Ninth Circuit's Order Striking Much of Hansen's Reply Brief Does Not Merit Certiorari. Hansen contends that the Ninth Circuit refused to consider his citation to *Marcus*, a 1943 decision of this Court.

Hansen's explication of the record is, to be frank, misleading.

Respondents moved to strike the bulk of Hansen's reply brief, and an inch-thick appendix of excerpts from the Congressional Record, because Hansen sought to utilize them to introduce a new argument about legislative history. The Ninth Circuit agreed and granted the motion. Respondents based their motion to strike on settled Ninth Circuit law, which provides that the Court of Appeals does not ordinarily consider arguments "not specifically and distinctly raised and argued in appellant's opening brief." *United States v. Garcia*, 149 F.3d 1008, 1010-11 (9th Cir. 1998); *see also Paciulan v. George*, 229 F.3d 1226, 1230 (9th Cir. 2000), *cert. denied*, 148 L. Ed. 673 (2001); *Heliotrope Gen., Inc. v. Ford Motor Co.*, 189 F.3d 971, 980 n.17 (9th Cir. 1999).

Hansen's implication that the Ninth Circuit zeroed in on his citation to *Marcus* as a reason for striking portions of Hansen's reply brief has no basis in fact. The reality is that Hansen cited the case just once in his 31-page reply brief, on page 15, in support of his lengthy new argument. The Ninth Circuit's decision to strike an entire argument Hansen asserted for the first time on reply was based on a rudimentary rule of appellate procedure, not on *Marcus* in particular. As noted above, *Marcus*'s interpretation of a long-repealed version of the False Claims Act does not support certiorari in this case.

The Non-jurisdictional Issues Raised by Hansen Were Not Decided Below and Are Not Appropriate for Certiorari. Hansen incorrectly states that the District Court and the Ninth Circuit somehow granted "legitimacy" to the appraisal methodology with which

Hansen disagrees. (*See* Petition, at 14.) The lower courts did not reach the merits of the appraisal methodology Hansen dislikes, because they lacked jurisdiction to do so. Likewise, Hansen jumps the gun by arguing about whether the Appraisal was a "false certification of compliance with applicable laws." (*Id.*) False certification is a merits issue that could only have been reached if the threshold subject matter jurisdiction issue had been decided in Hansen's favor, which, of course, it was not. Hansen's continued repetition of unsupported substantive allegations which have never been addressed by any court is not pertinent to this Court's standards for granting *certiorari* as set forth in Rule 10.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

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